SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

Nos. 580 and 581

INTERNATIONAL UNION, U.A.W.A., A.F. of L., LOCAL 232; ANTHONY DORIA, CLIFFORD MATCHEY, WALTER BERGER, ERWIN FLEISCHER, JOHN M. CORBETT, OLIVER DOSTALER, CLARENCE EHRMANN, HERBERT JACOBSEN, LOUIS LASS,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, as Members of the Wisconsin Employment Relations Board; and BRIGGS & STRATTON CORPORATION, a corporation,

Respondents.

Brief of BRIGGS & STRATTON CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

AUTHORITIES

Cases Cited

Statutes Cited

Other Authorities

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ARGUMENT

I. THE DECISION BELOW RESTS PURELY UPON A FINDING OF FACT, BASED ON SUBSTANTIAL EVIDENCE, THAT THE TACTICS ENGAGED IN WERE NOT A STRIKE.

A. The Wisconsin Statute Involved.

Chapter 57 of the Laws of Wisconsin of 1939 created Chapter 111 of the Wisconsin Statutes, known as the

Wisconsin Employment Peace Act. The section of that Act primarily involved here is:

> "Section 111.06(2) It shall be an unfair labor practice for an employe individually or in concert with others:
>
> (h) To take unauthorized posession of property of the employer or *to engage in any concerted effort to interfere with production* except by leaving the premises in an orderly manner for the purpose of going on strike." (our emphasis)

The validity of this section is discussed subsequently.

The Wisconsin Employment Relations Board, the Administrative Tribunal created to administer the Act, found as a *fact,* that the tactics engaged in, constituted a concerted effort to interfere with production and that they did not constitute a strike (R 122-134).

B. The Evidence Completely Supports the Board's Finding of Fact.

1. The Facts Established That the Activities Engaged in Were Production Interferences Within the Exact Language of the Wisconsin Act.

The petition for the Writ of Certitorari and Petitioners' brief fail to bring fairly and sharply to the attention of this Court the actual facts involved and the significance thereof which thus distorts and beclouds the real issues.

Briggs & Stratton Corporation operates two manufacturing plants in Milwaukee, Wisconsin, employing about one thousand production employees at each plant. (R 154). The Union is the certified bargaining agency for the Company's hourly-paid employees (R 155).

The Union and the Company had a number of contracts commencing about 1938. In 1944 differences arose over the terms of a proposed new contract and proceedings were taken before the War Labor Board in 1944 and 1945, during which the parties continued intermittent bargaining negotiations (R 155-157).

On November 6, 1945, at about 1:30 p.m., approximately two hours before the end of the first shift, virtually all of the production employees at both plants, without previous notice or warning and at the instigation and direction of the Union, suddenly interrupted production and left the plants. The night shift did not report for work. All employees reported at the usual times the following day, took control of their places of work and went to work (R 155-159). The Company was given no explanation then as to why the employees had left (R 158). However, it was told in December, 1945, that the walkouts were "spontaneous", not the Union's action, and were caused by the employees (R 160-161).

On November 16, 1945, the same procedure was followed, excepting that the night shift employees came to work. Thereafter and at closer intervals and at varying hours in the day the same procedure was followed on twenty-seven occasions between November 6, 1945 and March 22, 1946 (R 159-161; Exhibit No. 2, R 241).

Some weeks after the first walkouts the Company was told that the stoppages were being called so that employees could attend "Union meetings" (R 160). This was fictitious and the Union admitted at the hearing that "the intent of the work stoppage is to interfere with production" (R 177).

The procedure caused crippling chaos in the plant, including severe curtailment of production; delays in shipments to customers; piling up of inventories; complete disruption of work schedules; tremendous increase in overhead; serious losses and an unusual turnover in employees (R 161-165).

Employees who refused to participate had their lockers, clothing, tools and other personal property damaged, stolen and concealed and were subjected to threats coercion and intimidation (R 157, 183-216).

About February 10, 1946 (R 175), the Union leader who claimed to be the author of this new labor tactic (R 177), gave a detailed interview to the Milwaukee press and publicly boasted that the new "weapon" was definitely *not a strike* (R 175-177; Exhibit No. 6, R 242-6).

At the outset of this interview he stated that the series of "meetings", "are actually a new type of labor weapon designed to replace the strike" (R 242). He said, "We analyzed the picture thoroughly before we arrived at this idea" (R 243). He emphatically proclaimed, *"If you called this a new form of strike you would be making a bad mistake.* It's a labor weapon actually designed *to avoid a strike* and the hardships which a strike imposes on the workers. We think *it's a better weapon than a strike"* (R 242).

To nail the matter down, he then went into detail to point out the features that distinguished this new tactic from a strike (R 243-244) and among other things said:

> "The meetings are called without warning and take the Company by surprise. They find it difficult to make commitments or plan production. This can't be said for the strike. After the initial surprise of the walkout the Company knows just what to do and plans accordingly" (R 244).

Thus the new tactic was carefully devised for the express purpose of avoiding a strike and one of its most vicious purposes was to prevent an employer, no matter how unreasonable the Union's demands, from, (a) trying to carry on with such employees who want to work, or (b) hiring new employees, or (c) closing down the plant and making proper arrangements for its protection, as in the case of a strike.

Until the appearance of this public announcement, the Company had temporized with the situation and no one had been disciplined or discharged (R 159). If the employer had refused to permit the employees to return to work after such "Union meeting", the Union, whether correctly or not, would no doubt have asserted that the employer was guilty of an unfair lockout under the National Labor Relations Act.

However, after the newspaper article appeared, the Company filed a complaint with the Wisconsin Employment Relations Board charging the Petitioners herein with engaging in unfair labor practices under the section of the Wisconsin Employment Peace Act quoted above and also with violating other portions of that act.

At the trial the Union leader testified unequivocally:

> "I would say definitely that the *intent* of the work stoppage is to interfere with production." (R 177)

On virtually uncontroverted evidence, the Board found as *facts* that the Union and employees engaged in the twenty-seven work stoppages for the purpose of interfering with production; "publicly stated their intent and purpose to continue" such stoppages; threaten with punishment employees who failed to participate; had never conducted a strike vote required by the Wisconsin Act;

and "that *no strike has been called by the respondent Union nor the employees of the Briggs & Stratton Corporation against the Company at any time*" (R 124-126). (our emphasis)

The Board ordered the Union to cease and desist from "engaging in any concerted efforts to interfere with production *by arbitrarily* calling union meetings and inducing work stoppages during regularly scheduled working hours; or engaging in any other concerted effort to interfere with production of the Company *except by leaving the premises in an orderly manner for the purpose of going on strike*" (R 127). (our emphasis)

(This language of the foregoing portion of the order is incorrectly stated by Petitioners at page 5 of their petition).

The Board also ordered cessation of coercion and intimidation of employees and of acts of violence.

2. The Board Correctly Found on the Facts That the Activity Indulged in Was Not a Strike.

Petitioners, at pages 23-27 of their brief discuss what constitutes a strike, but divert attention from the fact that *that question is the first and most fundamental issue in the case.*

a. The Tactics Used Were Not a Strike Within the General Meaning of the Term.

Whether a given activity is a strike is a question of *fact.* The Petitioners formulate some elements of a strike at page 21 of their brief; indicating reliance on Webster's Dictionary. We do not find in the Webster edition cited the elements as set forth in Petitioners' brief. We do find

as the first element "an act of *quitting*", not merely *"stopping"* work. However, what the courts have said is more applicable here than a dictionary definition.

Section 1 of Chapter 372, 49 Stat. 499, U. S. Code, Title 29, Sec. 151-166 (Wagner Act 1935) provides:

> " . . . refusal by employers to accept the procedure of collective bargaining lead to strikes and *other* forms of industrial strife. . . " (our emphasis)

This recognizes the existence of other forms of economic warfare or labor weapons different from strikes.

In Section 2(3) of that Act, an "employee" is defined to "include any individual whose work has *ceased* as a consequence of, or in connection with, any current labor dispute . . . " (our empasis). Thus employees who are on *strike* retain their status as employees and such a situation exists only when the employees have *"ceased"* (stopped, ended) their work and not when they are insisting on continuing to work with self-declared, intermittent, interruptions.

The case of *National Protective Association of Steam Fitters and Helpers v. Cummings,* 170 N. Y. 315, states a commonly accepted definition of a strike thus, "A strike is to *cease* working in a body by pre-arrangement *until a grievance is redressed"*. (our emphasis)

The Restatement of the Law of Torts, Volume 4, Section 797, defines a strike as follows:

> "A strike is a *continued* refusal by employees to do *any* work for their employer, or to work at their customary rate of speed *until the object of the strike is attained*, that is, *until the employer grants the* concession demanded." (our emphasis)

The same authority points out that it is not a strike if employees *temporarily* stop work, even though using the

stoppage as an attempt to exact a concession and gives the following illustration:

> "A's employees, after consulting with each other, decide to have a picnic on a certain day. They request A's permission to be absent on the afternoon of that day. A refuses. The employees nevertheless cease work at noon and hold their picnic. *This stoppage is not a strike.*" (our emphasis)

There are many types of concerted activities by employees to bring pressure upon employers to yield concessions which have not been recognized to be strikes or to be legitimate, for example, the slow-down; a refusal to work scheduled hours as in *Mt. Clemens Pottery Co.*, 46 N.L.R.B. 714; a refusal to do assigned work as in *Niles Firebrick Co.*, 30 N.L.R.B. 426; ten to twenty minute stoppages of the production line in *Cudahy Packing Co.*, 29 N.L.R.B. 837; the refusal of waiters to serve meals at the scheduled time in *New York State L.R.B. v. Union Club of the City of New York*, 266 App. Div. (N.Y.) 516; the attempt to control shift time by coming in early as in *Harnischfeger Corp.*, 9 N.L.R.B. 676; the boycott; the refusal to work on material from strike-bound plants; the refusal to work on non-union goods and the sit-down so severely condemned by this court in *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 80 L ed. 627.

Another union announced its own schedule of days on which certain employees would report. This was properly condemned by the court in *Home Beneficial Life Ins. Co.*, 159 Fed. 2d 280, (4th CCA). In that case the union representatives carefully avoided the use of the word "strike" for the concerted withholding of work on certain scheduled days. The Union did declare and stage a genuine strike

somewhat later. The court held *the original activity did not amount to a strike* and said:

> "The statute (Sec. 7 (Wagner Act)), . . . does not and could not confer on them (the employees) the *right to engage en masse in unlawful activities*, or, to defy the authority of the employer to manage his business *while remaining in his service*: When they engage in an unlawful sit-down strike, as in (cites *Fansteel* case), they may be discharged by an employer, even though he has been guilty of unfair labor practices; and when, as here, *they refuse to obey the rules laid down by a law-abiding management for the conduct of the business*, they may be discharged and their places may be permanently filled." @ 284 (our emphasis and parenthetical insert)

A situation practically identical with the facts here is found in *C. G. Gonn Limited v. National Labor Relations Board*, (7th CCA) 108 Fed. 2d 390 (1939) where, when certain wage demands were not granted, the employees, without prior notice, stopped work in a body before the end of the scheduled work period, but returned to work at the regular time the next day indicating that they intended to continue the practice. The employees were disciplined and they brought charges of unfair labor practices before the National Labor Relations Board asserting that the procedure was a "strike" for which the employer could not impose discipline.

Because the factual situation is so close to that here and the court's analysis so ably points out the impropriety of the conduct on general principles we quote at some length for the convenience of the court:

> "We are supplied with numerous definitions of the word 'strike'. They are all substantially alike and we quote from American and English Encyclopedia of Law, Volume 34, page 123, as follows: 'The term

"strike" is applied commonly to a combined effort on the part of a body of workmen employed by the same master to enforce a demand for higher wages, shorter hours, or some other concession, by stopping work in a body at a pre-arranged time, and REFUSING TO RESUME WORK UNTIL THE DEMANDED CONCESSION SHALL HAVE BEEN GRANTED.'" @ 396

"We are of the opinion that *the facts* in the instant situation do not bring the discharged employees within this or any other definition of the word 'strike' of which we are aware. We are *unable to accept respondent's argument to the effect that an employee can be on a strike and at work simultaneously.* We think he must be on the job subject to the authority and control of the employer, or off the job as a striker, in support of some grievance." @ 397

* * * *

"(8) Even if it be assumed that there was a labor dispute, within the meaning of 2(9) the *fallacy of this argument to us lies in the fact that the employees did not cease work in consequence of such dispute.* Undoubtedly, when petitioner refused to comply with their request, there were two courses open. First, they could continue work, and negotiate further with the petitioner, or, second, they could strike in protest. *They did neither, or perhaps it would be more accurate to say they attempted to do both at the same time.* We have observed numerous variations of the recognized legitimate strike, such as the 'sit-down' and 'slow-down' strikes. It seems this might be properly designated as a strike on the installment plan.

"We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. That is plainly what was sought to be done in this instance. It is not a situation in which employees *ceased* work in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail.

If they had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment." @ 397 (our emphasis)

In the case of *Sandoval v. Industrial Commission,* (1942) 110 Colo. 108, 130 Pac. 2d 930, the court said:

"A strike possesses at least four ingredients other than the suspended employer-employee relationship which has been mentioned, namely: (1) A demand for some concession, generally for a modification of conditions of labor or rates of pay; (2) a refusal to work, with intent to bring about compliance with the demand; (3) an *intention* to return to work *when compliance is accomplished;* . . . " (our emphasis)

The Act of June 25, 1943, Public Law 89, 78th Congress (Smith-Connally Act) was for the purpose of trying to reduce strikes. Section 8-A provided that;—

"(1) The representative of the employees of a war contractor, shall give to the Secretary of Labor, the National War Labor Board, and the National Labor Relations Board, notice of any such labor dispute involving such contractor and employees, together with a statement of the issues giving rise thereto.

* * * *

"(3) On the thirtieth day after notice under paragraph (1) is given by the representative of the employees, unless such dispute has been settled, the National Labor Relations Board shall forthwith take a secret ballot of the employees in the plant, plants, mine, mines, facility, facilities, bargaining unit or bargaining units, as the case may be, with respect to which the dispute is applicable on the question whether they will permit any such interruption of war production."

It is highly significant that *no notice or vote to comply with that Act was ever taken in this case* and shows that

the employees here and their Union never deemed their procedure to be a strike.

The Wisconsin law contains a somewhat similar requirement for a strike vote and the Union's failure to comply with that requirement also proves the same thing.

Obviously Congress never intended that a series of short intermittent walkouts would be deemed strikes since if they were, then before each of the walkouts, the employees would have to give a thirty day notice and the Board would have had to conduct a strike vote,—in this case, twenty-seven between November, 1945 and March, 1946. No such ridiculous situation was contemplated by Congress and the obvious conclusion is that such tactics were never deemed by Congress to rise to the dignity of a strike.

b. The Wisconsin Law as to What Constitutes a Strike is in Accord with the General Rule.

The right to strike is expressly protected, not only through declarations of the Wisconsin court, and in Section 111.06(2) (h) quoted above, but also in Section 103.53 Wisconsin Statutes reading as follows:

> "(1) The following acts, whether performed singly or in concert, shall be legal:
> (a) Ceasing or refusing to perform any work . . . ".

The earliest Wisconsin case dealing with the meaning of the word strike is *State ex rel Zillmer v. Kreutzberg*, 114 Wis. 530 (1902) where the court said:

> " . . . included in the meaning of the word 'strike' was the mere concurrence of a number of individuals, in the exercise of their inherent right, to *quit* their employment, . . . " (our emphasis) @ 536

In the case before the court, the employees vigorously claim they did not in any sense "quit", but on the contrary assert they held on to their jobs which they could work at hours fixed by themselves.

In *Walter W. Oeflein, Inc. v. State,* 177 Wis. 394 (1922), the question was whether a strike was in existence when an employer advertised for labor. If it was, the employer had violated (present) Section 103.43 Wisconsin Statutes which prohibits advertising for labor without indicating that a strike is in existence, if such is the fact. The court said:

> "Webster's New International Dictionary, on page 2058, defines the word 'strike' as follows: 'An act of *quitting* when done by mutual understanding by a body of workmen as a means of enforcing compliance with demands made on their employer.'
>
> * * *
>
> "The number of men necessary to constitute a strike in refusing *to continue work,* pursuant to united effort, *depends in each case upon the peculiar facts in the case,* and no definite rule can be laid down. The legislature did not see fit to define the term 'strike,' but on the contrary used the term *in the sense that it is ordinarily used in* connection with labor troubles and as defined by standard authorities upon the subject." @ 399 (our emphasis)

In 1925 the Wisconsin Supreme Court was again confronted with a prosecution under the same statute and said:

> "There can be no question but that when by concerted action, a number of the company's employees *quit* work on October 22nd because of the proposed cut in wages, they then entered upon a lawful strike as such term is understood and declared." *West Allis Foundry Company v. State,* 186 Wis. 24, @ 28 (our emphasis)

Justice Charles H. Crownhart, well known friend of labor, wrote a dissenting opinion to the effect that, on the

facts, the strike still existed. A portion of his remarks have important bearing on the subsequent Wisconsin law:

> *"The real test of a strike must be:* Are the *usual concomitants* of a strike still attached to the situation; are the men *still out;* are pickets kept up; are the union and union papers *still* publishing notices of the strike; is pressure still maintained on the employer by which he is burdened financially, or physically and mentally impressed; are men prevented from accepting employment at the plant by reason of the conditions existing with reference thereto; are strike benefits *still* being paid; is the action of the employees, or the union in their behalf, to maintain the strike, in good faith with some hope of ultimate success? If any or all of these questions may be answered in the affirmative, there is some evidence of a strike actually existing, *and if most of them exist,* as they did in this case, then the *fact* of a strike actually existing is sufficiently established, as the term 'strike' is used in the act before us." (our emphasis) @ 39

This decision was rendered in February, 1925 and in June, 1925, the Legislature enacted Wisconsin Statute, Section 103.43 (1a) and thereby incorporated into the Wisconsin statutory law this definition of a strike:

> "A strike or lockout shall be deemed to exist as long as the *usual* concomitants of a strike or lockout exist; or the *unemployment* on the part of the workers affected *continues;* or any payments of strike benefits is being made; or any picketing is maintained; or publication is being made of the existence of such strike or lockout." (our emphasis)

This definition accords with the general understanding and confirms the proposition that *whether or not an activity in a given case is a strike is a question of fact on the evidence submitted in the particular case.*

Applying that statute here, virtually none of the prescribed concomitants of a strike (i.e. factual elements) were present. The employees were never "still out"; there was never any picketing; the union and the union papers, instead of publishing the existence of a strike, were publicly declaring that their procedure did not constitute a strike; no one was being prevented from accepting employment at the plant and no strike benefits were being paid.

The Petitioners argue that the duration of the withdrawals is not the test of whether an activity constitutes a strike. We agree. We emphatically insist, however that the authorities discussed establish that the question of the *intent* is one of the fundamental *facts* which determines whether a work stoppage is or is not a strike.

c. The Board's Finding of Fact, Supported by Substantial Evidence, is Made Conclusive by the Statute and Will Not be Disturbed on Appeal.

The public declaration of the persons who devised this technique that the stoppages were not strikes, is the clearest evidence of what the intent was;—namely *not to strike*.

Several varying and contradictory statements of the intent of the employees were given.

(1) The stoppages were first said to be "spontaneous" and without assigned purpose.

(2) The intent was next stated to be merely to attend "union meetings"; the causing of injury to the employer was merely an incident.

(3) The next intent testified to was to interfere with production and inflict economic loss and injury on the

employer and eliminate the possibility of the employer protecting himself.

(4) Finally the last intent, *advanced for the first time after the hearing before the Board*, was that the intent was to "strike".

Not only is it true that *intention* is one of the vital elements in determining whether a given activity constitutes a strike, but it is also clear that whether a given intention did or did not exist *is the question of fact.*

> "An intent already formed is a fact just as much as any other physical fact." *Baker v. W.U.T. Co.*, 134 Wis. 147; *Bowe v. Gage*, 127 Wis. 245; *Sharpe v. Hasey*, 141 Wis. 79; *Retail Clerks' Union v. Wisconsin Employment Relations Board*, 242 Wis. 21.

The Wisconsin Board had before it the Union's repeated assertions that the walkouts were not *intended* as strikes and did not constitute strikes and were with the intent of preserving to employees, rights which could not be preserved if the stoppages actually were strikes, and that the *intent* was to impose upon the employer a prolonged series of intermittent stoppages of production which would come without advance notice, could not be planned for, and which would exert a crippling effect on all efforts for planned operation of the business.

Bearing on this intent, the Board also had before it the fact that there had been no advance secret ballot for a strike as required by the Wisconsin Act or by the Smith-Connally Act which was evidence of no small significance on the issue of whether a strike was intended. Furthermore, there was before the Board the earlier conflicting assertions of the Union that the purpose of the stoppages were in no wise intended to interfere with production, but merely to allow the employees to attend bona fide

Union metings, which assertions were later repudiated by the Union.

On the other hand there was before the Board virtually nothing except the *arguments* of the Union's counsel that the stoppages did constitute strikes. That latter assertion would hardly be legally sufficient as *evidence* to raise an issue of fact as to the intent animating the work stoppages. While it is doubtful that the record before the court disclosed any evidence which could be considered substantial enough to support a finding that the intent was to strike, even if we assume, for the purpose of argument, that the record reflects *some* evidence that the intent was to strike, *the Board found to the contrary.*

The Wisconsin Act includes a provision, consonant with the general law, which defines the effect to be given a finding of the Board as follows:

> "The findings of fact made by the Board, if supported by credible and competent evidence in the record, shall be conclusive." Sec. 111.07(7) *Wis. Stats.* 1945.

Since the vital, factual elements upon which the question of "strike" or "no-strike" rests, were found by the Board upon evidence greatly prepondering in favor of the Board's finding, the fact that the stoppages were not strikes has been completely set at rest against the Petitioners. Those findings as pointed out, were sustained by virtually undisputed evidence and are, as the Statute declares, now "conclusive", — conclusive not only upon the Supreme Court of Wisconsin, but likewise upon this Court.

The same principle arises under the National Labor Relations Act and has been repeatedly applied by this Court.

In the face of the substantial, credible and competent evidence which amply supports the Board's finding on controverted factual elements, for this Court to undertake to re-determine those elements, or in any respect to examine into them beyond the point of verifying the existence of substantial evidence supporting the Board's findings, would be contrary to the settled principles of judicial review of administrative findings. All this the Petitioners' brief ignores.

The granting of certiorari could result in no more, upon the strike issue, than to have this Court verify what is now readily verified on the record, namely, that the Wisconsin Board's fact finding that these stoppages were not strikes is supported by ample evidence and thus beyond judicial re-examination.

II. THE WISCONSIN STATUTE INVOLVED AND THE ORDER IN CONFORMITY THEREWITH INFRINGE NO CONSTITUTIONAL OR FEDERAL RIGHTS OF PETITIONERS.

A. The History and Terms of the Act Show the Purpose is to Protect Completely All Rights of Wisconsin Citizens.

Petitioners' brief contains much inflamatory and reckless exaggeration including the following:

> "The order would in effect chain the employees to their machines, seal their lips and cut off communication with others, even during their off hours." @ 30.
>
> " . . . such protection from involuntary servitude becomes a mere sham . . . " @ 34
>
> "For the exercise of this kind of freedom as prescribed by the State of Wisconsin, can never lead to

the improvement or enlightenment of the working man's status, but only to his degradation and *further* (?) economic enslavement." @ 34-35 (our emphasis and question mark)

"The judgment . . . compels working people to labor against their will for the sole benefit of their employer, the Briggs & Stratton Corporation." @ 36

" . . . will enforce such order by fine or imprisonment if the chains are cut or the lips unsealed." @ 31

That Petitioners are compelled to fall back on such extravagant imagery, demonstrates the weakness of their position, draws in question the accuracy of other assertions and calls for dispassionate examination of the history and true effect of the Wisconsin law thus so violently attacked.

Wisconsin yields to no state in the advancement of social reform and legislation for the improvement of the status of working people (first workmen's compensation act, first legislation for protection of women and children employees, etc.). Its early protection of the right to strike has been noted.

In the late thirties, the nation had experienced the rise of the industrial unions, the intensive union organizing campaigns, and jurisdictional disputes, the bitter strikes in the steel and automobile industries, the spectacle of the *Fansteel* sit-down strike and the riots in connection therewith. *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 80 L. ed. 627, decided February 27, 1939.

The Wisconsin Legislature in enacting Chapter 57 of the laws of 1939 (Wisconsin Employment Peace Act) approached the labor problem from a somewhat different viewpoint than the Wagner Act and concluded that labor relations were "a two-way street". It recognized that the *public* has a major interest and that *both* employer and

employee have mutual duties, responsibilities and rights to be protected and that certain activities of *both* employees and employers should be discouraged.

Parts of the "Declaration of Policy" bear directly on the purpose and effect of the section of the Act here challenged.

> "Section 111.01. The public policy of the state . . . is declared to be as follows:
>
> "(1) . . . there are three major interests involved namely: that of the public, the employe and the employer . . . It is the policy of the state to protect and promote each of these interests with due regard to the situation and to the rights of others.
>
> "(2) Industrial peace, regular and adequate income for the employe, and uninterrupted production of goods and services are promotive of all of these interests.
>
> "It is also recognized that whatever may be the rights of disputants with respect to each other in any controversy regarding employment relations, they should not be permitted, in the conduct of their controversy, to intrude directly into the primary rights of third parties to earn a livelihood, transact business and engage in the ordinary affairs of life by lawful means and free from molestation, interference, restraint or coercion.
>
> "(3) Negotiation of terms and conditions of work should result from voluntary agreement between employer and employe. For the purpose of such negotiation an employe has the right, if he desires, to associate with others in organizing and bargaining collectively through representatives of his own choosing, without intimidation or coercion from any source.
>
> "(4) It is the policy of the state, in order to preserve and promote the interests of the public, the em-

ploye, and the employer alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated.

"While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat."

The Act expressly provides that:

"Section 111.04 Employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities."

The legislation provided that while employees should retain their right to strike, under proper circumstances for legitimate purposes and in an orderly manner, it would be an unfair labor practice for employees, individually or in concert with others, "to take unauthorized possession of the property of the employer or to engage in any other concerted effort to interfere with production" except by a strike, (Section 111.06(2)(h)).

The word "strike" was used in that section in harmony with the terms of Section 103.43 (1) discussed above. The word couldn't have been used as covering the activity here involved *since that tactic had not been devised in* 1939 *according to the Petitioners' own claims.*

While the legislature could not forsee all of the new "weapons" which might be devised, it plainly anticipated that there might be variations of the sit-down, slow-down

or other objectionable concerted efforts and hence it adopted the general phrase "concerted interferences with production" and banned them, while excepting from such phrase the well understood "strike".

Wisconsin preserved to the employees the right to endeavor to enforce employers to accede to demands by concertedly refusing to continue work until the controversy has been resolved, but for the preservation of the best interests of all its citizens it said employees shall not engage in sit-downs, secondary boycotts, slow-downs nor other concerted efforts to interfere with production. It said to employees, if you are going to be an employee, then perform for your employer the work which in good faith and by contractural implication you have agreed to perform at the times, places and manner set by the employer; if you are not satisfied with the conditions you are perfectly free to leave the premises whenever you wish to try to enforce your demands, but if you do so, stay off the premises until the dispute is settled.

If the employer thinks that he can operate with those employees who are willing to abide by the employment conditions, he is free to try it or he may close down his plant until the controversy is settled but he shall not be compelled to keep it open for the employees to work at their own whim.

Wisconsin placed a reasonable limit on the chaos and confusion which it will permit employees to cause in a given plant.

The argument that since the employer may not suffer as much from the tactics used here as he would by a genuine strike, therefore, the tactic should not be banned, is not tenable. The same might be said for the sit-down or the slow-down which by their very nature could not last over

the period of months involved here, but which have, nevertheless, been condemned by the courts. Those are labor tactics which are now admittedly improper and unlawful though having most of the elements which Petitioners say go to make up a strike.

The argument is like saying that a warring nation should not complain of the use of poison gas, since its opponent might have used a worse weapon.

The point is not whether a court might think that this particular activity is less "harmful". What governs is whether this legislation, which seeks by reasonable means, to reduce or limit the type of weapons to be used in economic warfare, actually deprives any person of any *specific* right which the Constitution says he shall have. Unless it clearly appears that the Constitution forbids this type of law, the court will not substitute its judgment for that of the Legislature as to what is the best way to promote industrial peace.

Because the "rules" of economic warfare permit strikes, is no basis for denying the right of a state to ban other objectionable practices calculated to injure others even though one may think such practices are "less harmful" than a strike.

This provision of the Wisconsin law is actually for the benefit and protection of the employee. Under the Federal legislation, as noted, a "striking" worker still retains his status as an employee and may not be disciplined for engaging in a lawful strike. However, for tactics such as these, — it is clear (and Petitioners' brief so concedes by implication at page 27) that the employer could discipline or discharge the employees involved.

The Wisconsin Supreme Court has very recently said:

> "The right to strike is a valuable right which not only the congress and legislature of the various states

but the courts, federal and state, have sought to guard and protect, but the right to strike does not include the right to commit assaults, destroy property, *deprive other people of the right to earn their living in the place where they are employed.*" *Wisconsin Employment Relations Board v. Allis-Chalmers Workers Union*, 252 Wis. 43, Dec. 23, 1947 (our emphasis)

Thus the Wisconsin Court which very vigorously protects a legitimate strike activity, in the case before the court recognized that one vice of the tactic here used, (which it held was not a strike) was its menace to the rights of working men themselves since it sought to destroy the right of *anyone* to work the jobs in the manner legitimately scheduled by management.

The Union leader testified he had had requests from 350 unions to see how the new tactic works (R 179), implying that if the procedure "stood up" the tactic would be widely used.

This disruption of production and deliberate confusion of operations is an unjustifiable interference with management which if it should become widespread can well mean the end of jobs.

The Union's brief glosses over the grave *practical* business considerations involved which are of vital interest to the welfare of employees, employers and the public alike. *If this device were actually given legal sanction it could mean the complete usurpation of management by the Unions.*

Certainly no court can say that this legislative enactment is so unreasonable as to be unconstitutional and that it will not accomplish its purpose of protection of the fundamental rights of *both* employers and employees.

The Union bases its brief on the fundamentally fallacious assumption that *any* concerted activities of a group of working men which they feel will be of benefit to them are guaranteed to them by the Constitution and that the Constitution and Federal law give them the *right* to try to enforce *any* demand by *any* type of "economic pressure" they can devise. Such is not the case. Even strikes, if conducted in an illegal manner (mass picketing and violence), or if engaged in to coerce an employer to perform an illegal act, and many other concerted activities which do not amount to strikes as above noted, are beyond the pale of the federal law or the protection of the Constitution.

B. Nothing in the Constitution or Federal Law Prohibits the Reasonable Regulation Imposed.

The SECOND REAL ISSUE then in this case is whether there is anything in the United States Constitution or the Federal law which provides that a state may not adopt a reasonable regulation for the welfare of its citizens of the type involved.

The brief in support of the Petition contains many generalities, but we find in none of the authorities cited, support for the brief's conclusions as to this statute. The The employees are all free to stop work and go out on strike whenever they see fit and to stay out as long as they choose. They do not have to work for this employer one minute. They have, however, been told that if they do not wish to engage in a legitimate strike and if they do want to insist on working for the employer, so long as they do so work, they shall stop interfering with production by the fictitious ruse of *arbitrarily* calling "meetings" during the regularly scheduled working hours. No Constitutional provision nor any Federal law can be construed

in so warped a fashion as to prohibit such regulation. It does not interfere with the free flow of goods in commerce, — it increases the likelihood of production. It makes slaves of none, but enhances the security of work and jobs.

None of the cases cited support the claim that the regulation in any sense interferes with the power of Congress over commerce (Const., Art. I, Sec. 8).

We find nothing in the brief even tending to indicate any prohibition in Article IV of the Constitution against regulation of the type here involved.

The argument with respect to the Thirteenth Amendment to the Constitution relating to involuntary servitude is nonsense. Petitioners have unduly frightened themselves over an imaginary spectre that just simply doesn't exist in the Act.

With respect to any alleged conflict between the statute and the Fourteenth Amendment to the Constitution, the Union fails to demonstrate that a single employee is deprived in any manner whatever of his lawful rights or his liberty or his property either with or without due process of law nor is any person within the jurisdiction of the State of Wisconsin denied the equal protection of the law as that term has been repeatedly interpreted in the cases.

The Union had devised a means of causing chaos in the production of goods which threatens to become widespread; the scheme calls for employees holding their jobs so that no other person can perform necessary work and at the same time permits the employees to refuse to perform their work at the time and in the manner in which their contract of employment requires. Wisconsin says that they may not do this; — they may quit their employ-

ment, they may engage in a strike, but if they intend to do neither, they shall not employ the underhanded disruptive procedure in question.

The tactics are not only as inherently untenable and improper as the sit-down but they were indeed another form of holding the employer's property against his will, and extending as they did over many months are even more disruptive, chaotic and promotive of damages than even the repudiated sit-down.

The Constitution either says directly or by implication that such tactics are immune from state regulation or it does not say that. Examination of the Constitution and the National Labor Relations Act discloses that on their face such activities are not so immune. *It follows that the regulation is permissible.*

The scrupulous jealousy with which Wisconsin guards employee's constitutional rights and at the same time demands respect for the law, can hardly be better expressed than in the following recent declaration of the Wisconsin Supreme Court:

> "In the administration of the law the courts of other states as well as this court protect the rights of workingmen as they are declared by the law, but in doing so it is not a part of their duty to ignore or palliate violations of law by workingmen who were treated exactly on the same basis and governed by the same law that governs other citizens of Wisconsin. While workingmen enjoy certain rights and immunities not enjoyed by other citizens the conferring of these privileges give them no license to violate the law of the land." *Wisconsin E. R. Board v. Allis-Chalmers W. Union*, 252 Wis. 43, @ 51 (1947).

Because it is anticipated that the Attorney General of Wisconsin will include in his brief, reference to the con-

stitutional authorities, this brief has purposely eliminated discussion of such authorities to avoid duplication.

III. CONCLUSION

The Petition for Writ of Certiorari should be denied because:

(1). The decision of the Wisconsin Supreme Court sought to be reviewed is primarily and simply a correct holding that there was substantial evidence to support the findings of fact of the administrative tribunal to the effect that the Petitioners' activities did not amount to a strike.

Hence no principles of general application or concern are involved.

(2) The Petitioners fail to demonstrate that they have been deprived of any of the Constitution or Federal rights or privileges.

Respectfully submitted,

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